BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

ENGIKKOLAI C. JAYARAMAN) Claimant)	
VS.)	Docket No. 181,298
MEADOWBROOK GOLF & COUNTRY CLUB Respondent)	
AND)	
ITT HARTFORD) Insurance Carrier)	
AND)	
KANSAS WORKERS COMPENSATION FUND	

ORDER

On September 17, 1996, the above matter came on before the Workers Compensation Appeals Board upon the application of the respondent for review of an Award entered by Administrative Law Judge Alvin E. Witwer on April 24, 1996, in Kansas City, Kansas.

APPEARANCES

Claimant appeared by and through Frederick W. Bryant appearing for Richard Rubins of Kansas City, Missouri. The respondent and its insurance carrier appeared by Max C. Schulz, Jr., appearing for Steven C. Alberg of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by and through Bruce D. Mayfield of Overland Park, Kansas. There were no other appearances

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

The following issues were raised by the respondent:

- (A) What is the nature and extent of claimant's work disability as a result of his accidental injury of April 30, 1992?
- (B) To what extent did claimant's previous traumatic lower back injury which occurred on January 7, 1991 contribute to claimant's disability from the injury of April 30, 1992?
- (C) To what extent did claimant's preexisting diabetic condition contribute to the claimant's disability from the injury of April 30, 1992?
- (D) Whether the previous January 7, 1991, injury or the claimant's preexisting diabetic condition constituted a handicap as contemplated under K.S.A. 44-566.
- (E) What is the liability of the respondent and the insurance carrier, if any, and what is the liability of the Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Administrative Law Judge denied the respondent reimbursement from the Kansas Workers Compensation Fund for claimant's back injury suffered on April 30, 1992. The respondent alleged that claimant's January 7, 1991, back injury coupled with claimant's preexisting diabetic condition was sufficient for workers compensation liability to shift to the Fund. The Appeals Board disagrees.

K.S.A. 1991 Supp. 44-567 provides in part:

- "(A) An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows:
- "(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund.
- "(2) Subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a

result of an injury and the director finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workers' compensation fund."

K.S.A. 1991 Supp. 44-567(b) states in part:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge."

It is the employer's burden to prove that it knowingly hired or retained a handicapped employee. <u>Box v. Cessna Aircraft Co.</u>, 236 Kan. 237, 689 P.2d 871 (1984).

While claimant did have preexisting problems associated with his back in 1991, there was no indication that claimant was returned to work with permanent restrictions. In fact, the indication was claimant returned to work without restrictions to his regular job.

Likewise, claimant's history of a diabetes condition preexisting April 30, 1992, did not rise to the level of a handicap to claimant's ability to obtain or retain employment. While claimant was diagnosed with diabetes, it appeared as though the condition was primarily taken care of with diet and had no effect upon claimant's ability to do his job. K.S.A. 44-566(b) (Ensley) defines a handicapped employee as:

". . . one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed "

While the Appeals Board acknowledges that diabetes is specifically listed as a condition which would constitute a handicap under K.S.A. 44-566 (Ensley), the language of the statute requires that this condition must constitute a handicap in obtaining employment or would constitute a handicap in obtaining reemployment. Neither appears to be the case here. The Appeals Board finds that the respondent has failed to prove by a preponderance of the credible evidence that claimant suffered a preexisting impairment which would constitute a handicap in his ability to obtain or retain employment. As such, liability against the Kansas Workers Compensation Fund must be denied.

With regard to the nature and extent of claimant's injury and/or disability from the April 30, 1992 injury, the Appeals Board finds that the Award of the Administrative Law Judge specifically sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The findings and conclusions enumerated in the

Award of the Administrative Law Judge are both accurate and appropriate and the Appeals Board adopts same as its own findings and conclusions as if specifically set forth herein as to the issue of nature and extent of claimant's injury and disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Alvin E. Witwer should be, and is, affirmed and the claimant, Engikkolai C. Jayaraman, is granted an award against the respondent, Meadowbrook Golf & Country Club, and ITT Hartford, its insurance carrier, for an injury suffered on April 30, 1992, for a 48.25% permanent partial general body disability.

Claimant is entitled to 32.29 weeks temporary total disability compensation at the corrected weekly rate of \$289 per week in the sum of \$9,331.81 followed by 382.71 weeks permanent partial general body disability compensation at the weekly rate of \$177.30 for a 48.25% permanent partial disability to the body as a whole in the sum of \$67,854.48 making a total award of \$77,186.29.

As of September 18, 1996, claimant would be entitled to 32.29 weeks temporary total disability compensation at the weekly rate of \$289 in the sum of \$9,331.81 followed by 196.57 weeks permanent partial general body disability compensation at the weekly rate of \$177.30 in the sum of \$34,851.86 making a total amount due and owing of \$44,183.67 which is ordered paid in one lump sum minus amounts previously paid.

Thereafter the balance of unpaid compensation in the amount of \$33,002.62 is to be paid the claimant at the weekly rate of \$177.30 per week for 186.14 weeks until fully paid or until further order of the director.

It is further ordered that claimant be reimbursed the sum of not more than \$350 unauthorized medical by the respondent and its insurance carrier upon presentation of an itemized statement verifying same.

It is further ordered, that except for its own attorney's fees, the Kansas Workers Compensation Fund shall be relieved of all liability in this matter in accordance with the above findings.

The fees necessary to defray the expense of the administration of the Workers Compensation Act shall be assessed against the respondent and its insurance carrier as follows:

Metropolitan Court Reporters, Inc.	\$ 322.50
Jay E. Suddreth & Associates, Inc.	1,527.60
Hostetler & Associates, Inc.	912.25
Sperling & Barraco, Inc.	Unknown
Appino & Biggs Reporting Service	356.40
Gene Dolginoff Associates	520.20

IT IS SO ORDERED.

Dated this	day of Oc	tober 1996.		
		BOARD MEM	BER	
		BOARD MEM	BER	

BOARD MEMBER

c: Richard Rubins, Kansas City, MO Steven C. Alberg, Overland Park, KS Bruce D. Mayfield, Overland Park, KS Alvin E. Witwer, Administrative Law Judge Philip S. Harness, Director